IN THE

# Supreme Court of the United States

October Term 1979

No. . . . **79-1502**

KERN COUNTY WATER AGENCY, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, SANTA CLARA VALLEY WATER DISTRICT AND TULARE LAKE BASIN WATER STORAGE DISTRICT,

*Petitioners,*

vs.

SIERRA CLUB, *et al.*,

*Respondents.*

**Petition for Writ of Certiorari to The United States Court of Appeals for the Ninth Circuit.**


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*Petitioners*,

vs.

SIERRA CLUB, *et al.*,

*Respondents*.

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.**

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding. Petitioners are California public agencies that have contracted with the State of California for continuing delivery of water from the State Water Project. The State water diversions needed for those deliveries are the subject of this action.

## Opinions Below.

The decision of the U.S. Court of Appeals is officially reported at 610 F.2d 581 and is reproduced in the Appendix.

(App. pp. 5-62.) The decision of the District Court is officially reported at 400 F.Supp. 610 (N.D. Cal. 1975) and is also reproduced in the Appendix. (App. pp. 63-129.)

**Jurisdiction.**

The Decision of the Court of Appeals was entered on October 31, 1979. The plaintiffs filed a petition for rehearing on November 21, 1979, which was denied on January 17, 1980. A petition for writ of certiorari is due by April 16, 1980. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) and Rule 19.1(b) of this Court.

**Questions Presented.**

1. Does the Rivers and Harbors Act of 1899 create a private right of action that authorizes plaintiffs to commence and prosecute this action?

2. Does Section 10 of the Rivers and Harbors Act of 1899 (hereinafter the "1899 Act" or "the Act") require a California state agency to obtain a federal *operating* permit from the United States Army Corps of Engineers, in order to divert water for reasonable, beneficial public uses, even if that diversion (1) represents the exercise of water rights established and regulated under state law, (2) is made through pumping facilities that are not located in navigable waters, (3) is made from an artificially created body of water, (4) is made through an intake structure which has been approved and permitted under the 1899 Act, and (5) does not interfere with navigation?

3. If so, do the Section 10 permits that the Corps of Engineers issued to the California Department of Water Resources for the intake structure for Clifton Court Forebay prior to the filing of this action, satisfy that requirement?

## Statutory Provisions Involved.

This case involves an interpretation of Sections 10, 12 and 17, of the Rivers and Harbors Act of 1899, 30 Stat. 1151 (1899), 33 U.S.C. §§ 403, 406 and 413. Those sections are set forth in the Appendix to this petition. (App. pp. 1-4.) This case also involves an interpretation of 38 federal statutes that recognize State authority to regulate, under state law, water supply diversions. The relevant sections of those statutes are also set forth in the Appendix to this petition. (App. pp. 131-151.)

## Statement of the Case.

### 1. Nature of the Controversy.

This case poses two fundamental issues concerning the Rivers and Harbors Act of 1899. First, it raises the question of whether the language of the 1899 Act can fairly be interpreted as creating a private right of enforcement. Six circuits have considered this question and have reached nearly as many results. There is a direct conflict on this issue between the Ninth Circuit opinion in this case and rulings by the Third and Sixth Circuits. Second, it raises issues regarding the extent to which Congress intends to subordinate state water rights law to federal regulation. It represents an effort to subordinate state law in a situation in which that law is not inconsistent with congressional directives within the meaning of this Court's decisions in *California v. United States*, 438 U.S. 645, 98 S.Ct. 2985 (1978) and *United States v. New Mexico*, 438 U.S. 696, 98 S.Ct. 3012 (1978).

### 2. Facts of the Case.

The State of California has constructed and is operating a multi-billion dollar water project pursuant to a bond authorization approved by the State's electorate in 1960 and

pursuant to decisions of the California Supreme Court. Intervenors and 27 other public water agencies have contracted with the State to repay the costs of constructing and operating that Project, in return for long-term deliveries of specific quantities of water from that project, which is commonly known as the State Water Project (SWP). Petitioners need that water to meet water supply requirements of thirteen million people and a significant proportion of California's agricultural economy. (App. pp. 8, 9, 66.)

Essentially all the water supplies for the SWP are currently diverted from the Sacramento-San Joaquin Delta (Delta) through a water diversion facility known as the Delta Pumping Plant. (A map of the Delta, showing the Delta Pumping Plant in the southern portion thereof, is attached to the District Court opinion, p. 130A of the Appendix.) That facility is located outside navigable waters and diverts water from an artificial body of water known as Clifton Court Forebay. It in turn is connected to the Delta by means of an intake structure that was installed in a levee of a Delta Channel under a permit issued by the Corps of Engineers pursuant to Section 10 of the Rivers and Harbors Act of 1899. The evidence in this case does not show that the SWP diversion of waters from the Delta Pumping Plant impedes navigation. The California Department of Water Resources (DWR) operates the SWP. (App. pp. 70, 71.) The United States has built a similar multi-billion dollar water project, known as the Central Valley Project (CVP) which also exports water from the Delta. (App. pp. 9, 69, 70.)

DWR and the United States divert water from the Delta for the SWP and the CVP pursuant to water rights permits issued by the California Water Resources Control Board (WRCB). That Board has reserved continuing jurisdiction over those permits to regulate SWP and CVP water diversion operations, to protect prior vested water rights, water quality

in the Delta, and fish and wildlife resources. Accordingly, the WRCB limits SWP and CVP operations to maintain specific salinity and streamflow conditions in the Delta channels at specific times.[1]

The WRCB regulates SWP and CVP diversions of water from the Delta under an extensive body of State water law. The State has developed that law through comprehensive statutory controls, California Constitution, Article X, Section 2; Cal. Water Code Part 2, Division 2, and implementing judicial rulings, *Environmental Defense Fund v. East Bay Municipal Utility District*, 26 Cal.3d 183, 194 ff (1980), in order to assure that California's water resources are used in an economically efficient and environmentally sound manner. (Public Resources Code §21000, *et seq.*)

The State of California is planning to modify its present Delta diversion operations by building a canal, known as the Peripheral Canal. However that facility is not the subject of this petition. (App. pp. 71, 72.)

**3. Proceedings Below.**

Plaintiffs filed this action in March 1971, to enjoin DWR and the United States from diverting water from the State Water Project's Delta Pumping Plant and Central Valley Project's Tracy Pumping Plant until the Corps of Engineers issues operating permits for those diversions. In addition, the action seeks to enjoin construction of the Peripheral Canal until the Corps has approved its construction and operation, and until the constructing agency complies with

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[1]The WRCB revised the SWP and CVP Delta diversion water rights permits in August 1978, by issuing Water Rights Decision 1485. Plaintiff Sierra Club, participated in the lengthy administrative proceedings on which the WRCB based that decision. Although fourteen suits are now pending in the California Superior Court challenging that decision, the Sierra Club has not challenged it. (Judicial Council Coordination Proceeding No. 548; San Francisco County Superior Court.)

the relevant requirements of The National Environmental Policy Act, 42 U.S.C. §§4331 and 4332 and the California Environmental Quality Act, California Public Resources Code §21000, *et seq.*

The District Court ruled that a private cause of action exists to enforce Section 10 of the 1899 Act (App. pp. 72-80); and that the diversions of water from the Delta by the SWP and the CVP constitute a sufficient technical modification of navigable capacity to require operating approval by the Corps under Section 10 of the 1899 Act. (App. pp. 80-93.) The Court also ruled that the Section 10 permits which the Corps had previously issued to DWR and the United States did not cover either the SWP or the CVP diversion operations. (App. pp. 93-99.)

The Court of Appeals rendered its opinion on October 31, 1979. It affirmed the existence of a private right of action under Section 10 of the 1899 Act (App. pp. 11-12), but dismissed one of the plaintiffs, Friends of the Earth, for lack of standing. (App. pp. 25-26.) It also affirmed that DWR must obtain operating permits from the Corps under Section 10 of the 1899 Act, in order to continue to divert Delta water through SWP's Delta Pumping Plant, unless otherwise exempted by Corps regulations. (App. pp. 26-39, 53-54.) In addition, it infers that the Corps can control the environmental impact of those diversions even if they do not affect navigation in any substantial way. (App. pp. 54-55, fn. 39.)

However, the Court of Appeals reversed the District Court with respect to operation of the federal CVP Tracy Pumping Plant. (App. pp. 40-49.) It ruled that Congress had impliedly approved that operation and had thus exempted it from any requirement to obtain operating permits from the Corps under the 1899 Act. Plaintiffs filed a petition for rehearing on the grounds that the Court had misapprehended the law

relating to implied Congressional authorization. The Court denied that petition without opinion, but stayed implementation of its decision pending this Court's action on the State's application for a writ of *certiorari*.

The State of California filed its petition for writ of *certiorari* with this Court on February 13, 1980. (Docket No. 79-1252.) Fifteen western states have filed an amicus curiae brief in support of the State's petition. The State's petition, like this petition, challenges the Court of Appeals' interpretation of Section 10 of the 1899 Act. However, it does not raise the private right of action question which is the focus of the first part of this petition. In addition, it does not raise the issues of statutory construction or adequacy of existing DWR permits, presented in the latter part of this petition.

**4. Special Importance of the Issues.**

The State's contracts with petitioners for delivery of water from the SWP constitute an essential element of that project, as well as a basic long-term water supply for the millions of people that reside within petitioners' service areas. Those contracts provide the basic means for financing the multi-billion dollar SWP and meeting the State's related constitutional limitation on State indebtedness, California Constitution Article XVI, Section 1. They are premised on the application of State water law to SWP's water diversions from the Delta, that do not impair navigation. (App. p. 66.)

Imposition of federal controls on the State's water diversions is of even more concern to petitioners than to the State, because those controls will seriously jeopardize petitioners' respective water supplies and their respective financial responsibilities. By allowing the U.S. Corps of Engineers to subordinate state laws in matters that extend beyond federal navigation requirements, the Court of Ap-

peals' opinion injects major uncertainty into California's multi-billion dollar State Water Project, and, more specifically, into petitioners' respective water supplies. (App. pp. 118-119.)

The Court of Appeals' opinion would, transfer the basic authority over the Project's water delivery capability to a federal agency that has no responsibility for the State Water Project's operational or financial integrity. In addition, that agency can ignore the legal safeguards that petitioners have developed over the past twenty years in cooperation with the State's electorate, legislature, and judiciary to assure optimum use, reliable operation, responsible funding, and financial feasibility (*Joint Brief of Intervenors Upon Completion of the Trial on Entitlement to Relief.*)

## REASONS FOR GRANTING THE WRIT.

### I.

### This Case Presents Important Federal Questions That Deserve the Attention of This Court.

This petition raises two fundamental issues concerning the Rivers and Harbors Act of 1899: (1) whether the statute creates a private right of enforcement, and (2) whether the substantive provisions of Section 10 of the Act (33 U.S.C. §403) apply to water supply diversions approved pursuant to state law even if they do not adversely affect navigable use or the navigable capacity needed to support that use.

The private right of action issue has never been presented to this Court. Yet, there are decisions from six circuits that encompass a wide range of opinions from complete denial of such a right to complete acceptance of such a right. The law in this area is in utter confusion and needs clarification by this Court.

In addition, the Ninth Circuit opinion in this case literally ignores two of this Court's most recent private right of action cases (*Cannon v. University of Chicago*, .... U.S. ...., 99 S.Ct. 1946 (1979) and *Touche Ross & Co v. Redington*, .... U.S. ...., 99 S.Ct. 2479 (1979)) and thereby adopts an erroneous test to ascertain whether private rights of action exist. Given the importance of the 1899 Act to management and control of the nation's major waterways, this question deserves the Court's attention.

The interpretation of Section 10's scope and purpose is equally important as it raises fundamental issues of federalism that have never been fully briefed and argued to this Court. Although this Court has considered cases involving water diversions (*e.g., United States v. Rio Grande Dam and Irrigation Co.*, 174 U.S. 690, 19 S.Ct. 770 (1899); *Sanitary District of Chicago v. United States*, 266 U.S. 405,

45 S.Ct. 176 (1925); and *State of Wisconsin v. State of Illinois*, 278 U.S. 367, 49 S.Ct. 163 (1929)), the Court of Appeals has ruled that the United States has jurisdiction to control such diversions even if they may have no effect on navigation.

This issue could have a major impact on development of the western states. Historically, in accordance with long-standing federal laws and policies, the states have controlled water use within their boundaries, including balancing the often competing demands of instream uses (environmental, recreational, or scenic) with uses for irrigation and municipal purposes. Suddenly, under the Court of Appeals' opinion, the United States, through its Corps of Engineers, has the ultimate authority to balance instream uses with other competing water needs, *even if no federal interest under the 1899 Act exists*. The Court of Appeals' decision thus substantially diminishes California's control over water projects representing investments in the billions of dollars and thus, prejudices petitioners' water supplies. Such a result should not be allowed to prevail and this Court should grant the requested writ to properly balance the state and federal interests.

II.

## The Court of Appeals' Opinion Improperly Implies a Private Right of Action to Enforce Section 10 of the 1899 Act.

### A. IN GRANTING PLAINTIFFS A PRIVATE RIGHT OF ACTION, THE COURT OF APPEALS IMPROPERLY REJECTED THE SUPREME COURT'S MOST RECENT PRONOUNCEMENTS ON THIS SUBJECT AS A RESULT OF MISINTERPRETING UNITED STATES V. WYANDOTTE TRANSPORTATION COMPANY.

During the years this case has been pending, this Court has developed a body of law which establishes the method

for determining whether a federal statute implies a "private right of action." *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080 (1975); *National Railroad Passengers Corp. v. National Association of Railroad Passengers (Amtrak)*, 414 U.S. 453, 94 S.Ct. 690 (1974); *SIPC v. Barbour*, 421 U.S. 412, 95 S.Ct. 1733 (1975); *Cannon v. University of Chicago*, .... U.S. ...., 99 S.Ct. 1946 (May 1979) and *Touche Ross & Co. v. Redington*, .... U.S. ...., 99 S.Ct. 2479 (June 1979).

The Ninth Circuit Court of Appeals ignored the two 1979 decisions and compounded this error by ruling that the decisions in *SIPC v. Barbour, supra,* and in the *Amtrak* case, *supra,* do not apply to the Rivers and Harbors Act of 1899. (App. p. 12.) The Court of Appeals apparently reached this result because it misinterpreted this Court's ruling in *Wyandotte Transportation Co. v. United States*, 389 U.S. 191, 88 S.Ct. 379 (1967), and extended that holding far beyond the applicable facts.

### 1. Rejection of Recent Decisions.

There are three enforcement provisions in the 1899 Act: Section 12 (33 U.S.C. §406), Section 16 (33 U.S.C. §411), and Section 17 (33 U.S.C. §413). Section 16 is not applicable because this case only involves alleged violations of Section 10 of the Act. (33 U.S.C. §403, App. pp. 1, 2.) Section 16 only applies to violations of Sections 13, 14 and 15 of the 1899 Act. Therefore, the key enforcement language is found in Sections 12 and 17. These sections, as codified in 33 U.S.C., are set forth in the Appendix, at pages 2-4. They specifically state that the Attorney General and the Department of Justice shall enforce the 1899 Act.

The Court of Appeals noted these enforcement provisions and stated:

> Normally, these express statutory provisions would imply that no other means of enforcement are intended, with only clear contrary evidence of a legislative intent to rebut this presumption. (App. p. 16.)

The Appeals Court correctly cited *SIPC v. Barbour* and the *Amtrak* case, for these cases clearly hold that a private right of action is not generally to be implied in the face of statutory language of the type contained in the 1899 Act. 414 U.S. at 457-458, 94 S.Ct. at 693; 421 U.S. at 418-420, 95 S.Ct. at 1737-1738.

In spite of the Court of Appeals' recognition of this precedent and of its generally controlling nature, it rejected the applicability of these cases to the 1899 Act, stating that *Wyandotte Transportation Co. v. United States, supra*, requires a different result. (App. p. 17.) In making this ruling, the Court misinterpreted the scope of the *Wyandotte* decision and ignored important language contained in *Cannon v. University of Chicago, supra*.

**2. Misinterpretation of Wyandotte Transportation v. United States.**

The *Wyandotte* case is simply not precedent for a private right of action issue. *The United States was the plaintiff in Wyandotte*, and the Court did not even address the issue of private parties' right to suit. In *Wyandotte*, the defendant contended that a sunken vessel could be abandoned, thereby relieving its owner of the duty of raising it and removing it as a navigational obstruction. Defendant further claimed that if the United States removed the vessel, the United States could only recover its costs by selling the vessel and its cargo, but could not obtain a personal judgment against its owner if the removal costs exceeded the salvage value. It was in this context, where the Government had spent several million dollars raising a dangerous barge load of

liquid chlorine from the bottom of the Mississippi River, that this Court said:

> But our reading of the Act does not lead us to the conclusion that Congress must have intended the statutory remedies and procedures to be exclusive of all others. There is no indication anywhere else — in the legislative history of the Act, in the predecessor statutes, or in nonstatutory law — that Congress might have intended that a party who negligently sinks a vessel should be shielded from personal responsibility. We, therefore, hold that the remedies and procedures specified by the Act for the enforcement of § 15 were not intended to be exclusive. Applying the principles of our decision in *Republic Steel,* we conclude that other remedies, including those here sought, are available to the Government. (389 U.S. at 200-201, 88 S.Ct. at 385.)

To use this language to override the usual rules for ascertaining the existence or nonexistence of a private right of action under the 1899 Act extends the *Wyandotte* case far beyond its holding. It ignores the fact that the objective of the case was to protect the United States' right to fully protect navigable waterways and the fact that the very language quoted ends with the phrase "other remedies . . . are available *to the Government.*" *Id.* It further ignores *Wyandotte's* later statement that "a principal beneficiary of the Act, if not the principal beneficiary, is the government itself." *Id.* It is one thing to hold that the principal beneficiary of the Act (the United States) should have broad remedies available to protect the public waterways of this nation. It is a far different thing to use such a holding to discard the normal rules of statutory interpretation as they apply to the 1899 Act. Yet it was just such a conclusion which led the

Court of Appeals to reject this Court's rulings in *Amtrak* and *SIPC v. Barbour*.

In reaching its conclusion that the usual statutory interpretation tests do not apply to the 1899 Act, the Court of Appeals also overlooked the references to the 1899 Act and *Wyandotte* in the very recent decision of *Cannon v. University of Chicago, supra*. In that case, in footnote 13, this Court stated:

> Conversely, the Court has been especially reluctant to imply causes of action under statutes that create duties on the part of persons for the benefit of the public at large. (.... U.S. at ...., 99 S.Ct. at 1955.)

Earlier, in that same footnote, the Court had referred to the 1899 Act (through a reference to the *Wyandotte* case) as a statute which "creates a duty in favor of the public at large." (.... U.S. at ...., 99 S.Ct. at 1954.)

Petitioners believe that the Court of Appeals was wrong in rejecting full application of *Amtrak* and *SIPC v. Barbour*, and in ignoring *Cannon v. University of Chicago* and the other cases which will be cited below. The *Wyandotte* case does not insulate the 1899 Act from complete scrutiny pursuant to *Cort v. Ash* and the subsequent explanatory cases.

**B. APPLICATION OF THE RULES ENUNCIATED IN THIS COURT'S RECENT DECISIONS DEMONSTRATES THAT THE COURT OF APPEALS ERRED IN FINDING A PRIVATE RIGHT OF ACTION TO ENFORCE THE 1899 ACT.**

**1. The Language of the Statute and Its Legislative History.**

The law is now clear that while the four-part test of *Cort v. Ash* may be utilized by the lower courts, the ultimate question is whether Congress intended to create a private right of action. *Touche Ross & Co. v. Redington*, .... U.S at ...., 94 S.Ct. at 2485 (1979). The language of the statute

itself and its legislative history are the most important elements to be examined. Viewed from either of the two perspectives, the 1899 Act does not authorize private enforcement actions.

The Court of Appeals conceded in its opinion (see quote, *supra*, page 12) that the language of Sections 12 and 17 of the 1899 Act normally would be interpreted as not allowing a private right of action. The language of *Touche Ross & Co. v. Redington, supra*, reinforces this conclusion when it states:

> And where, as here, the plain language of the provision weighs against implication of a private remedy, the fact that there is no suggestion whatsoever in the legislative history that §17(a) may give rise to suits for damages reinforces our decision not to find such a right of action implicit within the section. See *Cort v. Ash, supra*, 422 U.S., at 82-84, 95 S.Ct., at 2089-2091; cf. *Securities Investor Protection Corp. v. Barbour, supra; Amtrak, supra; T.I.M.E., Inc. v. United States*, 359 U.S. 464, 79 S.Ct. 904, 3 L.Ed.2d 952 (1959). (.... U.S. at ...., 99 S.Ct. at 2486-7, footnote omitted.)

The 1899 Act is identical to the *Touche Ross* statute in this regard. The 1899 Act, through Sections 12 and 17 (33 U.S.C. §§406 and 413), places the duty of enforcing the Act on the Department of Justice and the United State's attorneys. Therefore, the plain language weighs against implication of a private right of action. As in *Touche Ross*, there is no legislative history for the 1899 Act suggesting any other result. In fact, the only relevant legislative history produced by any party to this litigation shows that Congress during the legislative process *removed* language which would have allowed private enforcement of the Act.

The Court of Appeals describes this legislative history in footnote 9 of its opinion. (App. p. 15.) It dismisses it as irrelevant, stating that it only disclosed an intent to foreclose private enforcement of the penal provisions of the statute. This is an improperly restrictive reading of the legislative history. The activities of Congress leading to adoption of the Rivers and Harbors Act show that Congress knew how to draft language which would create a private right of action. It had such language in the legislation at one time, but removed it prior to adoption. Further, similar language was not included in any other part of the statute.

Both the clear language of the statute and its history show that the Court of Appeals went beyond permissible limits in its eagerness to reach the merits of this case. It erred in a manner similar to that described in a case decided earlier this term. In *Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis*, .... U.S. ...., 100 S.Ct. 242 (1979) this Court stated:

> While some opinions of the Court have placed considerable emphasis upon the desirability of implying private rights of action in order to effectuate the purposes of a given statute, e.g., *J.I. Case Co. v. Borak, supra,* what must ultimately be determined is whether Congress intended to create the private remedy asserted, as our recent decisions have made clear. *Touche Ross & Co. v. Redington, supra,* .... U.S., at ...., 99 S.Ct., at 2485; *Cannon v. University of Chicago, supra,* .... U.S., at ...., 99 S.Ct at 1953. (.... U.S., at ...., 100 S.Ct., at 245.)

**2. The Especial Benefit Test.**

One of the *Cort v. Ash* tests used to discern Congressional intent investigates the question of who was intended as the "especial beneficiary" of the statute in question. (422 U.S.

at 78, 95 S.Ct. at 2088). The Court of Appeals totally overlooked this Court's decision in *Cannon v. University of Chicago, supra,* in analyzing this issue and thereby compounded its interpretive error.

As noted previously (*supra,* p. 13), *Wyandotte* holds that the government is one of the beneficiaries if not the primary beneficiary of the 1899 Act, and *Cannon*, in its footnote 13, reiterates this point when it states that the 1899 Act benefits the general public.

This Court, in *Cannon,* then contrasted statutes which expressly identify a private class that Congress intends to benefit from statutes enacted for protection of the general public. In cases where private rights of action have been inferred, Congress has used words such as "person," "employee," or "representative" to indicate its intent (.... U.S. at ...., 99 S.Ct. at 1954). This Court then continued by stating:

> There would be far less reason to infer a private remedy in favor of individual persons if Congress, instead of drafting Title IX with an unmistakable focus on the benefited class, had written it simply as a ban on discriminatory conduct by recipients of federal funds. . . . (.... U.S. at ...., 99 S.Ct. at 1954-5.)

Section 10 of the 1899 Act is a clear example of the latter kind of statute for which there is far less reason to infer a private right of action. It simply proscribes conduct with no "unmistakable focus" on individual persons. This is why the 1899 Act was used as an example of a statute benefiting the public at large in footnote 13 of the *Cannon* case. (.... U.S. at ...., 99 S.Ct. at 1954-5.)

The Court of Appeals' decision in this case is at complete odds with all the recent private rights of action cases. The effort to ascertain legislative intent was only given lip serv-

ice and relegated to a second priority. In its place, the Court of Appeals gave improper emphasis to its own view that private parties should be allowed to enforce the act. To correct this error, the requested writ should be granted.

### C. THE PLAINTIFFS' CLAIMS ARE IN AN AREA TRADITIONALLY RELEGATED TO STATE LAW.

Because the recent cases have emphasized the importance of determining Congressional intent, *Touche Ross*, 99 S.Ct. at 2489, this petition has not yet discussed one factor of the *Cort v. Ash* test, whether the action is one traditionally relegated to state law in an area basically the concern of the states, 422 U.S. at 78, 95 S.Ct. at 2088.

Plaintiffs seek by this action to restrict water supply diversions which are regulated under State water law that represents an exercise of historical State police power. It is clear from a reading of both the trial and appellate court opinions that plaintiffs are not interested in interferences with boating, shipping, commerce, and similar matters which have traditionally been the focus of the 1899 Act. Instead, they are attempting to force the Corps of Engineers to utilize their regulatory authority over navigation, to impose water quality and fish and wildlife protection conditions on water diversion activities of the State of California.

However, the State of California regulates the water diversions that plaintiffs challenge under State water rights appropriation laws that are administered by its Water Resources Control Board. The United States has traditionally relegated that control to the State for more than a century (*Jennison v. Kirk*, 98 U.S. 453 (1879); *California v. United States, supra*).

Furthermore, California control over water rights diversions is based on the exercise of its police powers. *Joslin v. Marin Mun. Water Dist.*, 67 Cal.2d 132, 144 (1967).

California has incorporated that authority directly into Article 10, Section 2 of its Constitution. (See *People v. Forni*, 54 Cal.App.2d 743, 749-50 (1976)). California's Legislature and judiciary have implemented that police power authority through a comprehensive set of provisions for administering water supply diversions. *Environmental Defense Fund v. East Bay MUD*, 26 Cal.3d 183, 194 ff. (1980). Statutes governing water diversion appropriations of the type involved in this case are codified in California Water Code Sections 1200 to 1801. In acting on applications to divert water, the Water Resources Control Board must consider all beneficial uses of the water, including preservation and enhancement of fish and wildlife, recreation and water quality. (Water Code §§ 1243, 1243.5 and 1257.)

California's DWR has obtained WRCB permits to divert waters from the Delta for the SWP, pursuant to these Water Code provisions after lengthy public hearings. Any of the plaintiffs could have filed protests and been heard on the applications (Water Code §§1330-1335). The plaintiff Sierra Club did, in fact, appear and participate in two sets of hearings held in 1969-1970 and 1976-1977 by the State WRCB to limit the SWP and the federal CVP water rights permits, by imposing more specific provisions for fish and wildlife protection and salinity control in the Delta.[2] California's water law allows any interested party to obtain judicial review of Water Resources Control Board decisions in the Superior Court (Water Code Section 1360, Code of Civil Procedure Section 1094.5), and, of course, to appeal the decision to the higher courts (Code of Civil Procedure Section 1110). Thus, ample jurisdiction has existed and has

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[2]These hearings resulted in Decision 1379, issued by the State Water Resources Control Board on July 28, 1971, and Decision 1485, issued in August 1978.

been available to the plaintiffs in the State forum, for the assertion and protection of their interests and claims.

It is abundantly clear, therefore, that the appropriation of waters within California's borders is an activity that is basically the concern of that State, and that the control of that activity has been traditionally relegated to the State. This creates an additional strong reason why, on the facts of this case, the Court of Appeals should not have found a private right of action to enforce Section 10 of the 1899 Act.

**D. THERE IS A SUBSTANTIAL SPLIT AMONG THE CIRCUITS CONCERNING PRIVATE RIGHTS OF ACTION UNDER THE 1899 ACT.**

There is an important reason, aside from the national interest in proper interpretation of the nation's basic navigable waters statute, for granting a writ of certiorari in this case. It is hard to imagine a more complete split in the Circuits than the one which exists on the issue under consideration.

The Ninth Circuit Court of Appeals relied primarily on two Fifth Circuit opinions, *Neches Canal Co. v. Miller and Vidor Lumber Co.*, 24 F.2d 763 (1928), and *Tatum v. Blackstock*, 319 F.2d 397 (1963) to support its view that a private right of action exists.[3] (App. p. 13.) These two cases clearly stand for that proposition, but contain no analysis of the type now required. As a result of these two cases and the Ninth Circuit opinion which is the subject of this petition,

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[3]The Court of Appeals also relied on *State of Wisconsin v. State of Illinois, supra*. Reliance on that case is misplaced. In that case plaintiffs were complaining of violation of riparian and other rights and the defendant raised an 1899 Act permit as a defense. (287 U.S. at 409-410, 49 S.Ct. at 169.) The case did not involve private plaintiffs suing to enforce the Act.

two circuits have concluded that unlimited private rights of action exist.

A case from a District Court in the Fourth Circuit, *James River and Kanawha Canal Parks, Inc. v. Richmond Metropolitan Authority*, (359 F.Supp. 611 (E.D. Virginia); Affd., 481 F.2d 1280 (1973)), took a more circumspect view, and granted a limited private right of action. It authorized private enforcement by those proving specific injury to enjoin planned construction *before it begins*. The Court went out of its way to limit its holding to the facts before it stating:

> It may be that an injunction ordering the removal of an already constructed obstruction is not available to a private litigant, since this form of relief approaches closely the civil remedy given to the United States. The Court can well see how the hardship which such a removal would normally involve might well have prompted Congress to have phrased the statute so that only the United States, in its discretion, might apply for such relief. An injunction against planned construction, such as that involved in this case, does not suffer from such infirmities, however. (359 F.Supp., at 639.)[4]

The Fourth Circuit affirmed the lower court decision *per curiam*, noting that no questions of standing or jurisdiction had been raised on appeal (481 F.2d at 1281). Had such an issue been raised, we do not know what the result would have been. However, by its affirmation, the Fourth Circuit, *sub silentio*, may have recognized a limited private right of action.

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[4]An injunction against operation of existing facilities is, of course, what was sought in petitioners' case with respect to the Delta and Tracy Pumping Plants. Therefore, this case falls within the exception noted in the *James River* case.

The Second Circuit has not directly ruled on whether private individuals with specific injury can sue to enforce the 1899 Act. However, it has ruled that private parties acting on behalf of the public cannot enforce the Act. In *Connecticut Action Now, Inc. v. Roberts Plating Co.*, 457 F.2d 81 (1972), a citizens group sought to enjoin a discharge of waste to navigable waters under Section 12 of the 1899 Act. In denying the right of enforcement, the Court set forth policy language which petitioners believe is applicable to any proposed private action:

> [The lawsuit] is obviously intended as a substitute for, and equivalent of, an injunctive action by the Federal Government. The clear congressional purpose, it seems to us, was to concentrate at least this type of public and general enforcement in the Department. If both the Attorney General and private individuals could institute enforcement proceedings, there would only be a difference of degree, between criminal prosecutions and civil injunction suits, in the possibilities of conflict and disruption. A careful federal decision not to seek an injunction because of some general policy, or in view of other means of ending or alleviating the discharge, could be upset by any individual who thought he understood better the needs of the public. We doubt that the 1899 Congress, when it enacted §413, envisaged that the theory of participatory democracy would be carried so far. (457 F.2d at 89.)

Based on this opinion, the Second Circuit seems to lean heavily away from granting private rights of action.

The Third Circuit has ruled that no private right of action exists (*Red Star Towing & Transportation Co. v. Dept. of Transportation of New Jersey*, 423 F.2d 104 (1970)). Although this case was finally decided on Eleventh Amendment grounds, the Court specifically held that Section 12

of the 1899 Act (33 U.S.C. §406) did not create a civil cause of action in favor of private parties (423 F.2d at 105). The Ninth Circuit Court of Appeals' opinion attempts to distinguish *Red Star Towing* because of the Eleventh Amendment issue. However, realizing that this might be insufficient, the Court, ultimately, simply disagrees with the Third Circuit holding. (App., p. 11, fn. 6.)

Finally, and most directly in opposition to the Ninth Circuit view, the Sixth Circuit, in an opinion issued less than three months before the opinion in this case, ruled that private rights of action are flatly inconsistent with the language of the 1899 Act and the most recent Supreme Court opinions. In *City of Evansville v. Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008 (1979), the Court reviewed all the cases cited in this petition, quoted from them extensively, and ruled that given the statutory language the evidence was insufficient to support a conclusion that Congress intended to create a private right of action (604 F.2d at 1011-12).

What is significant about the *City of Evansville* case is its use of the 1979 Supreme Court cases on private rights of action as the basis of its decision. This is in direct contrast to the Ninth Circuit's opinion which completely fails to analyze or distinguish the same cases. Petitioners believe the Sixth Circuit opinion properly analyzes the law and shows the magnitude of the error by the Ninth Circuit.

Six circuits have considered the issue discussed above and have reached six conclusions which encompass a continuum from complete acceptance of private rights of action, to a limited acceptance of private suits, to rejection of a private right of action. Such broad confusion and conflict on the same matter among so many circuits creates signif-

icant uncertainty on an important federal question. This Court could resolve that uncertainty by granting the requested writ and issuing an authoritative statement of the law.

III.

**The Circuit Court's Opinion Preempts State Water Law and Thus Expands the Scope of Section 10 Beyond That Intended by Congress.**

The Court of Appeals' opinion extends the 1899 Act beyond its orginal purpose, into matters traditionally relegated to State Law. That extension would significantly expand the manner in which the Government has administered the Act over the past 80 years. It would require the Corps of Engineers to act as a national water rights regulator independently of either navigation burdens or State water rights law. It would also conflict with the Third Circuit's interpretation of Section 10 of the 1899 Act.

The Court of Appeals' expansion of the 1899 Act is premised on three serious defects. First, it relies on a strained technical interpretation of the plain language of Section 10 that has no tangible relevance to the Act's purpose. Second, it, in effect, strikes one of the key words of Section 10. Third, it relies on a selective incorporation of Congressional policy from other statutes, that ignores a much more relevant and pervasive policy expressed both in federal water resource management statutes and recent decisions of this Court.

As a result, the opinion vitiates an important Congressional policy, by subordinating State water rights law to general federal regulation, independently of any substantial impairment of the federal navigation interest. This subordination of a traditionally State concern—the allocation of water rights and the administration of water diversions—to regulation by the U.S. Army Corps of Engineers, severely

undermines the principles of federal-state relationship on which this court based its recent decision in *California v. United States, supra*. It would also duplicate existing State regulatory programs.

This duplicative regulation would result not from application of the 1899 Act but from other recently enacted federal statutes which the Corps of Engineers must follow once 1899 Act jurisdiction attaches. Under the Court of Appeals' decision, *any* alteration of a navigable stream creates federal jurisdiction, even if navigable capacity is unaffected. (App. p. 28.) Once federal jurisdiction attaches, however, the Corps of Engineers may deny a permit even if no obstructions are created if, under the requirements of the National Environmental Policy Act and similar federal statutes, it determines that non-navigational considerations such as water quality and fish and wildlife protection are impaired. *Zabel v. Tabb*, 430 F.2d 199, 211 (5th Cir., 1970). (App. p. 24.)

California has adopted its own comprehensive environmental protection (Cal. Public Resources Code, §21000, *et seq.*) and water quality (Cal. Water Code, §13000, *et seq.*) statutes. It vigorously applies these statutes to all water diversions within the state. The Court of Appeals' decision would allow the Federal Government to veto all decisions made by the State of California involving its totally intrastate water project, even if no federal navigation interest is affected. Such a decision improperly distorts the intent of the 1899 Act and seriously undermines the State's control over its water resources.

**A. THE CIRCUIT COURT'S OPINION RELIES ON A STRAINED TECHNICAL INTERPRETATION OF SECTION 10 THAT DOES NOT FURTHER THE PURPOSE OF THE 1899 ACT.**

The Ninth Circuit's opinion stretches the plain meaning of the third clause of Section 10 of the 1899 Act (see App.

pp. 27-28, 39) and thereby expands its scope beyond its original purpose, in a manner that preempts existing Congressional policy. There is no sound reason for that preemption in either the Act itself, or in this Court's previous decisions.

In making this assertion, petitioners are not insisting on the narrowest possible definition of navigable capacity as the Court of Appeals' opinion charges. (App. p. 28, n. 24.) Neither do we dispute that Congress possesses broad power to protect navigation, and to subordinate State law to implement that power, as the opinion suggests. (App. p. 38.) However, in the area of water diversion law, Congress has tempered its exercise of power by deferring to State water law in the absence of direct inconsistency with federal statutes. *California v. United States, supra*. The plain language of the 1899 Act is not inconsistent with that deferral, and the Court of Appeals should not stretch the Act in order to make it inconsistent.

Furthermore, the fact that the 1899 Act does not explicitly mention noninterference with State water law is not controlling, as the opinion also suggests. (App. p. 36.) That suggestion ignores the decisions of this Court in analogous situations that limit federal preemption of State laws and implied repeal of federal statutes.

### 1. The Statute.

Congress enacted Section 10 of the 1899 Act to regulate the creation of obstructions to navigation caused by altering the physical structures[5] that enclose the Nation's navigable waterways. Since common law did not regulate those obstructions, Congress had been forced to enact legislation to

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[5]The term "physical structures" refers both to natural or artificial features, such as banks, beds, channels, and levees which define the boundary of specific navigable waters.

protect navigation, which at that time represented a major percentage of the Nation's transportation system, *Williamette Iron Bridge Co. v. Hatch*, 125 U.S. 1, 8 S.Ct. 811 (1888); *Hubbard v. Fort*, 188 Fed. 987 (1911). 32 Cong. Rec. 1350-51 (1899). Subsequent case law has added to the types of activities originally covered by the Act, nonstructural operations which substantially interfere with the navigable capacity needed to support recognized navigation. *Sanitary Dist. of Chicago v. United States, supra.*

The Court of Appeals' opinion, however, concludes that Section 10 applies not only to actions which alter the physical structure enclosing navigable waters, but also to the nonstructural activities such as water supply diversions, even if those activities are not shown to affect navigation. (App. pp. 28, 39.) The opinion bases this conclusion on a selective interpretation of the third clause of Section 10, which in effect, edits the word "channel" out of the statutory language. It does not even address the limitation inherent in the use of that term. Indeed, the opinion describes the test for Section 10 coverage of the State's water diversions as "Whether there has been any modification or alteration of the condition or capacity of a navigable stream." (App. p. 28.)

While previous decisions have given an expansive meaning to the term "channel", they have invariably construed it as referring to the physical bed of a stream, bay or sound, rather than to the waters which it encloses. *Oklahoma v. Texas*, 258 U.S. 574, 593-594, 42 S.Ct. 406, 414. The Circuit Court's opinion, however, assumes that Section 10 includes changes solely in the flow characteristics of the water carried in a channel. It, therefore, concludes that the 1899 Act applies to every nonstructural modification of the water levels or other flow characteristic of a navigable stream. (App. pp. 39, 54, 118, 119, n. 62.)

## 2. The Cases.

The Court of Appeals supports its generous interpretation of Section 10 by cases that involve either changes in a physical structure enclosing navigable waters, or substantial burdens on navigation. But these precedents are not applicable to the present controversy.

### a. The Changed Channel Cases.

Most of the cases on which the Court of Appeals relies involved situations where activities physically changed the structure of the bed underlying navigable waters. (App. pp. 24, 31-33.) Although these changes were not shown in every case to directly affect navigation, they easily fell within the plain language of Section 10. The Ninth Circuit, in spite of the fact that these cases involved physical alteration of a channel or shoreline, made a logic leap and concluded that they established "beyond cavil that an alteration or modification of navigable waters is sufficient to trigger the permit requirements of Section 10," (App. p. 32.) That interpretation is particularly misplaced because it relies specifically on *United States v. Moretti* (*Moretti I*), 478 F.2d 418, 429 n. 37 (5th Cir. 1973). However that decision expressly limited its holding to "any *filling* of navigable waters", *Id.*

### b. Navigation Burden Cases.

The Court of Appeals relied on two other types of cases for its expansive interpretation of Section 10. One type involves the factual situation where there is a clear demonstration of substantial impairment of commercial navigation. In the other type, this Court articulated a factual navigation impairment test for situations where the Attorney General initiates injunctive proceedings.

(i) *Great Lakes Cases.*

The Ninth Circuit's opinion places its primary reliance on two decisions of this Court that dealt with sewage dilution diversions from Lake Michigan, *Sanitary Dist. v. United States, supra*, and *Wisconsin v. Illinois, supra*. Not only were those diversions not based on state authorized and regulated water rights, but they also resulted in extensively documented impairment of major commercial navigation on at least four of the Great Lakes. They reduced the annual Great Lakes shipping capacity by over three million tons, valued at the time at a cost of 88 cents per ton. That impairment affected seven states, an international treaty with Great Britain, four hundred harbors, and a hundred federally improved channels, 278 U.S. at 407-409, 49 S.Ct. 167-169; 266 U.S. at 423, 426; 45 S.Ct. at 177-179.[6]

(ii) *United States v. Rio Grande.*

The Court of Appeals also relied on *United States v. Rio Grande, supra*. That decision, although enjoining storage of water on a non-navigable upstream portion of the Rio Grande River, did give serious consideration to the Congressional policy of deferring to State water rights law.

This Court went out of its way in *Rio Grande* to limit its impact on activities which otherwise would have only local significance and which normally present no federal issues to situations where actual obstructions to needed navigable

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[6]Petitioners submitted to the Court of Appeals for Judicial Notice, excerpts from the following public documents that are filed with this Court in *Sanitary District v. U.S., supra:*

1. Pages 92 to 94 and 118 and 119 of the General Index to the Transcript of Record, Volume A
2. Index pages I to V and pages 87 to 117 of the Brief for Appellee United States
3. The Amicus Curiae Brief of the Lake Carriers Association.

If petitioners' writ is granted, we will resubmit to this Court, our original Motion Requesting Judicial Notice.

capacity are demonstrated. (174 U.S. at 704, 19 S.Ct. at 775, 777), stating:

> It does not follow that the courts would be justified in sustaining any proceeding by the attorney general to restrain any appropriation of the upper waters of a navigable stream. The question always is one of fact, whether such appropriation substantially interferes with the navigable capacity within the limits where navigation is a recognized fact. (174 U.S. at 709, 19 S.Ct. at 777.)

*Rio Grande* clearly articulated the policy which existed when Congress adopted the 1899 Act and which Congress has continued to follow. That policy is that federal statutes should not be construed to grant federal regulatory control over state regulated water rights diversions, unless those diversions alter flows in a manner that impairs substantially the stream's capacity to support established navigation. The Court of Appeals' opinion failed to apply this policy, and thereby authorized the United States to involve itself in any diversion of water from a navigable stream.

(iii) *The Navigation Burden Test.*

A specific test for determining whether a challenged activity constitutes a burden on navigation for purposes of Section 10 was formulated and applied in *United States v. Bigan*, 170 F.Supp. 219 (W.D. Penn. 1959), affirmed 274 F.2d 729 (3rd Cir. 1960). That decision concludes that an alleged obstruction to navigable capacity of the type specified in the first clause of Section 10 requires a tangible showing of navigational impairment, especially if the obstruction is not delineated in the second or third clauses. Indeed, to justify abatement of an alleged obstruction to navigable capacity, as plaintiffs seek in this case, more must be shown than the mere possibility of future injury to nav-

igation. The navigational impairment must be imminent and the requested abatement action must be needed to avoid irreparable injury to navigation. 170 F.Supp. at 225-26, 274 F.2d at 733.

Application of the *Bigan* test to the record in this case would demonstrate that the State's challenged diversion of waters from the Delta does not constitute an obstruction to navigable capacity within the meaning of Section 10. The Third Circuit's interpretation of the scope of the first clause of Section 10, therefore, conflicts with the Ninth Circuit's interpretation. (App. pp. 26, 27.) That conflict creates serious uncertainty in a vital area of federal law. By this petition, we request this Court to resolve that conflict by adopting the Third Circuit's interpretation.

**B. THE CIRCUIT COURT'S OPINION VITIATES IMPORTANT CONGRESSIONAL POLICY.**

**1. Rejection of the Policy.**

The Court of Appeals incorporates Congressional policy from other federal statutes to justify its strained interpretation of Section 10. However, it refuses to incorporate more relevant, and indeed more current, Congressional policy established in numerous federal water resource statutes. As a result, the opinion circumvents the long-standing Congressional policy of preserving state jurisdiction over water rights allocations. It, therefore, vitiates much of that policy, because much, if not most, of the nation's public water supplies are diverted from surface streams.[7]

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[7]Over 300 billion gallons of fresh water are diverted from the nation's surface streams each day, *The Nation's Water Resources 1975-2000: Second National Water Assessment by The U.S. Water Resources Council*, Volume 1 (1978), pp.18 and 29. Currently, State and local agencies administer nearly all of those diversions, *The Nation's Water Resources: First Annual Assessment of the Water Resources Council (1968), p. 5-1-1.*

The Court of Appeals' opinion literally destroys the States' control over these critical resources and Congressional deferral to that control, by holding that any technical alteration of navigable waters triggers Section 10 permit jurisdiction even if that alteration does not impair navigation.

However, the Fifth Circuit dredge and fill cases, on which the Court of Appeals relies (App. pp. 24, 32), rely in turn on policy considerations in other federal statutes (*Zabel, supra,* at 208-214; *Moretti I, supra,* at 429). While those policy considerations may be relevant in unregulated dredge and fill cases, they are much less relevant in this case. As noted previously, California already imposes strict environmental controls on Delta water export operations, through its regulation of water diversion rights (Calif. Water Code §§1243, 1243.5, 1255, 1257 and 1258); *EDF v. East Bay MUD, supra* and through its environmental quality act (Calif. Public Resources Code Section 21000, *et seq.*) There is, therefore, no reason to thrust the Corps of Engineers into the water diversion regulation business when federal navigational interests are absent. But this is precisely what the Court of Appeals' decision does.

On the other hand, the Court of Appeals refused to consider the well-defined Congressional policy which is incorporated in at least three dozen federal water resources statutes that are just as relevant to this case as the environmental statutes were to the Fifth Circuit cases. (App. p. 33, n. 26.) That refusal is particularly insupportable in light of this Court's recent recognition of the history of Congressional intent in the field of federal-state jurisdiction over the allocation of waters, and its general deference to State water rights law, *United States v. New Mexico,* 438 U.S. at 701-702, 98 S.Ct. at 3015; *California v. United States,* 438 U.S. at 678-679, 98 S.Ct. at 3002-3003. Those two decisions

clearly recognize that Congress considers water supply diversions as matters traditionally relegated to State law. However, none of the Fifth Circuit cases involved issues of federal-state water jurisdiction that are so central to this case. Consequently, the courts in those cases did not consider the Congressional policy of deferring to State water law, in the absence of a tangible inconsistency with a clear federal interest.

The Court of Appeals' opinion interprets *California v. United States* very narrowly. Indeed, it appears to limit that decision to "the context of federal *reclamation* projects". (App. pp. 35-36.) That limitation manifests a serious misreading not only of *California v. United States,* but also of this Court's concurrent decision in *United States v. New Mexico*. The latter decision was not a reclamation act case, but it still recognized the same Congressional deference to State water law as did *California v. United States*. Furthermore, *California v. United States* itself cites a non-reclamation act statute, the McCarren Amendment, as "the most eloquent expression of the need to observe State water law." That Act subjects the United States to state court jurisdiction for general stream adjudication of water diversion rights, 438 U.S. at 678, 98 S.Ct. at 3002. (App. p. 140.)

Apparently, the Court of Appeals also considers 37 other federal statutes deferring to State water law as essentially limited to reclamation projects (App. pp. 33-36) and, therefore, inapplicable to a navigation statute. However, less than a third of those acts are reclamation act statutes. The relevant portions of those statutes are set forth on pages 131-151 of the Appendix to this petition, with asterisks identifying the Reclamation Act Statutes. The non-reclamation act statutes cover a broad spectrum of water supply, water quality, and water rights adjudication matters, that

have direct application to navigable waters. Indeed, Congress has continued to reassert its policy of deferring to State water law, in water resource legislation enacted after the District Court filed its opinion in this case.

Congress' most recent reassertion of its deference to State water law occurred in the 1977 amendments to the Federal Water Pollution Control Act, 33 U.S.C. §1251, *et seq.* (retitled as the Clean Water Act). (App. p. 150.) That Act now contains the following reaffirmation of Congress' long-standing policy of deferring to State water law:

> It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act. (33 U.S.C. §1251(g).)

**2. Preemption Analogy.**

The Court of Appeals also bases its refusal to incorporate the Congressional policy of deferring to State water law, on the fact that the 1899 Act does not itself mention non-interference with State-authorized water supply diversion operations. (App. p. 36.) However, in analogous situations, involving other federal statutes, this Court has deferred to State law, where that deferral would not impair basic federal responsibilities, *Linn v. United Plant Guard Workers*, 383 U.S. 53, 59-61, 86 S.Ct. 657, 661-662 (1966). (National Labor Relations Act, 29 U.S.C. §141, *et seq.*); *Florida Lime and Avocado Growers v. Paul*, 373 U.S. 132, 144, 83 S.Ct. 1210, 1218 (1963), (Federal Agricultural Adjustment Act, 7 U.S.C. §601, *et seq.*)

This Court has not required an express statutory statement of noninterference with State law, in order to limit federal preemption of State law. Instead, it has refused to infer federal statutory preemption of State law without an unambiguous Congressional mandate to that effect, particu-

larly where the State law represents, as it does here, an exercise of historic State police power, 383 U.S. at 59, 86 S.Ct. at 661; 373 U.S. at 146, 83 S.Ct. at 1219.

In the present case, the continued deference to State water rights law does not stand as an obstacle to the accomplishment and execution of the basic purposes and objectives of the 1899 Act, so long as regulation of water rights diversions is limited to cases involving substantial interference with navigable capacity required to support established navigation. *United States v. Rio Grande, supra.* Indeed, State water rights laws have coexisted with federal regulation of navigation for 80 years, without any significant conflict between the two regulatory schemes.

Even more importantly, the plaintiffs have not presented any evidence of Congressional intent to preempt the field of water rights law. Instead, there is ample evidence to the contrary, that Congress in fact intends to recognize and protect State water rights jurisdiction over water supply diversions from navigable waters in the absence of any substantial impairment of established navigable capacity.

### 3. Implied Repeal.

Finally, the Circuit Court's rejection of the Congressional policy articulated in the 38 statutes recited in the Appendix impliedly repeals a significant portion of that policy, and, in fact, partially repeals some of those statutes. For example, Section 301(a) of the Water Supply Act of 1958 (App. p. 145) states the following general policy applicable to all federal agencies:

> It is hereby declared to be the policy of the Congress to recognize the primary responsibilities of the States and local interests in developing water supplies for domestic, municipal, industrial, and other purposes and that the Federal Government should participate and

> cooperate with States and local interests in developing such water supplies in connection with the construction, maintenance, and operation of Federal navigation, flood control, irrigation, or multiple purpose projects.

The Circuit Court's opinion would impliedly repeal that statute, at least as it applies to navigable waters. It would transfer primary authority for regulating water supply diversions from navigable streams, to the Federal Government. Accordingly, it would preclude the states from exercising one of their primary responsibilities for developing navigable water supplies, namely the authority to allocate rights to the use of those supplies.

However, the principles of statutory interpretation do not favor repeals by implication. *United States v. Borden Co.*, 308 U.S. 188, 198, 60 S.Ct. 182, 188 (1939); *General Electric Credit Corp. v. James Talcott Inc.*, 271 F.Supp. 699, 704-05 (S.D. N.Y., 1966). There is, indeed, a judicial duty to give effect to both the old (1899 Act) and new (1958 Water Supply Act) statutes, absent a repugnancy between the statutes. *United States v. Healey*, 160 U.S. 136, 146, 16 S.Ct. 247, 251 (1895); *United States v. Jackson*, 302 U.S. 628, 631, 58 S.Ct. 390, 392 (1938).

## IV.

## The Court of Appeals Erroneously Limited the Authorization Contained in the Section 10 Permits That the United States Issued to the State for Clifton Court Forebay, Prior to the Filing of This Action.

The Court of Appeals' opinion rejects the Section 10 permit that the Corps issued to DWR for connecting Clifton Court Forebay to the Delta, as adequate Section 10 authority for the SWP's water diversions from the Delta. (App. pp. 50-51.) This was done in spite of the fact that these physical

structures were installed for the sole purpose of allowing the State to make those diversions.

Surprisingly, however, the opinion also rules that the Corps has adequate authority under that permit to regulate the State's operation of the Delta Pumping Plant. (App. p. 51, n. 37.) The Court of Appeals invokes that regulatory authority from the terms of the permit itself, and from the Corps' regulations. The permit contains a condition that if the Secretary of the Army determines that the structure connecting Clifton Court Forebay to the Delta causes:

> . . . unreasonable obstruction to the free navigation of said water, [DWR] will be required upon due notice from the Secretary of the Army, to remove or alter the structural work or obstructions caused thereby without expense to the United States, so as to render navigation reasonably free, easy, and unobstructed . . . . (Permit No. 4101.)

Apparently, the Court of Appeals agrees that that condition provides the federal regulatory authority necessary to protect navigation, even though it limits federal involvement to that needed to correct unreasonable obstructions to navigation. As indicated above, that limitation is flexible enough to allow responsible regulation of SWP diversions under State water law, and still assure protection for navigation.

The Court of Appeals also concludes that adequate federal authority for regulating SWP water diversions exists under the present permit, through regulations that allow the Corps to initiate action to "modify, suspend, or revoke" that permit, upon a reevaluation of circumstances. (App. p. 51 n. 37.) Consequently, the opinion's analysis does not support its conclusion that the State's existing Section 10 permit does not adequately protect the federal navigation responsibility.

**Conclusion.**

For the foregoing reasons, the opinion of the Court of Appeals in this case, (1) conflicts with the decisions of at least two other Courts of Appeals on whether a private right of action exists under the Rivers and Harbors Act of 1899; (2) has decided important questions of federal law relating to the application of Section 10 of that Act to water supply diversions that have not been, but should be, settled by this Court; and (3) has decided a federal question relating to the applicability of that Section to State water law, in a way that conflicts with applicable decisions of this Court. Because the foregoing reasons are special and important, Petitioners respectfully request that the writ for *certiorari* be granted.

Respectfully submitted,

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